IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.224 OF 2006

Krishnaji Rajaram Ramdas ...Appellant

Vs.

Ramchandra Rajaram Ramdas & Ors. ...Respondents

Mr.Sandesh D. Patil for the Appellant
None for the Respondents.

CORAM: A.S.OKA, J.
DATED: APRIL 10,2006.

P.C.:

1. Heard Shri Patil for the Appellant-original Plaintiff. The Appellant along with his mother Gitabai filed a suit for partition and separate possession against the Respondents. The Respondent Nos.1 to 2 are the real brothers of the Appellant. After the preliminary decree was passed, the Appellant's mother expired. In Darkhast Proceedings the Appellant claimed that the deceased mother had executed a will under which the entire share of the mother was bequeathed to him. The Respondent Nos.1 to 2 who were the Judgment debtors raised an objection to the said plea of the Appellant and therefore, the parties led evidence. The Executing court by an order dated 25th September 2001 held that the Appellant has failed to established the will. The executing court held that the share of the Appellant's mother will be divided amongst the Appellant and the Respondents who

are the natural legal representatives of the deceased mother. An Appeal preferred by the Appellant was dismissed.

2. While addressing this court on maintainability of the Appeal preferred by the Appellant, the learned Counsel for the Appellant submitted that the Respondent Nos.1 and 2 obstructed the execution of the decree by the Appellant in so far as the share of the mother is concerned and therefore, the order made on adjudication by the executing court will have a force of decree in view of the rules 101 and 103 of Order XXI the Code of Civil Procedure, 1908. He, therefore, submitted that the Appeal preferred in the District Court was maintainable and therefore, this Second Appeal is maintainable.

3. He further submitted that after the preliminary decree was passed by the Trial Court, the Appellant's mother expired and in fact in the Appeal preferred against the preliminary decree, the Appellant represented his mother as her only legal representative. He pointed out that none of the Respondents have raised any objection to the said Appeal preferred by the Appellant and therefore now the Respondents are estopped from raising the contention that there is no valid will in favour of the Appellant. He submitted that the courts below have committed an error by considering the question whether the testator was physically fit for

executing the will. He submitted that in fact mental fitness ought to have been considered.

4. I have considered the submissions. As the learned Counsel for the Appellant submitted that the Appeal in the District Court was maintainable in law, I have considered the merits of the Second Appeal. It is an admitted position that when the Appeal was preferred by the Appellant in the District Court against the preliminary decree claiming himself to be the legal representative of the deceased mother, no adjudication was made on the question of proof of will. Even in absence of the will the Appellant is one the legal representatives of the deceased mother and he could have always maintained the Appeal in the capacity of a legal representative of the mother. Therefore, merely because the Respondent Nos.1 and 2 did not raise any objection at the time of hearing of the said Appeal, the Respondent Nos.1 and 2 will not be precluded from disputing the execution of the will.

5. The Courts below have considered the various circumstances which are brought on record. In paragraph No.10, the learned Trial Judge has adverted to the question whether the deceased Gitabai was mentally and physically fit while making the will. The Appellate court has noted that at the time of the execution of the alleged will the age of the

said Gitabai was 85 years and she died within 10 days from the execution of the alleged will. Therefore, the Appellate Court observed that it was the duty of the Appellant to adduce evidence to show that the said Gitabai had sound and disposing mind at the time of execution of the will. The Courts below have considered the inconsistency in the evidence of the attesting witnesses regarding the time at which the will was executed. The Courts have also noted that the deceased Gitabai was illiterate and the Appellant himself has taken a prominent part in getting the will executed from the said Gitabai.

6. These are the circumstances which are considered by the Courts below and the Courts have come to the conclusion that the Appellant has failed to establish the will. I find no perversity in the findings recorded by the Courts below. No case is made out for interference. Second Appeal is dismissed with no order as to costs.

Judge.